critical, because EarthLink does not contend that cable platform owners must sell to ISPs a bundled transport and content service in which the cable company provides all of the functionality to the end user. Rather, it is EarthLink's position that the service that cable companies are required to make available on a non-discriminatory basis is the cable-based transport service over which Internet access and other information services are provided. It is this transport service that is meant by "cable modem service."

The distinction between transport and Internet access and other information services provided over a communications network is essential to a proper reading of the Act because the Act itself draws such a distinction. Section 3(20) of the Act (47 U.S.C. § 153(20)) defines "information service" as follows:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. (emphasis added)

As the underlined phrase in the definition indicates, the Act distinguishes between the information manipulation capabilities of "information services" and the means by which those capabilities are delivered to consumers.

As the plain language states, information services are delivered "via telecommunications," indicating that the transport function is separate from the functions that are offered to end users as information services. That the functions are separate and distinct is further demonstrated by comparing the definition of "information service," set forth above, with the definition of "telecommunications":

> The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.[36]

Whereas the definition of "information service" lists as one of the defining characteristics a capability for "transforming" information, the essence of "telecommunications" is the transmission "without change in the form or content" of information. Accordingly, although information services cannot exist absent telecommunications (since information services are by definition provided "via telecommunications"), information services and telecommunications services are nonetheless distinct according to the unambiguous words of the statute.

2. The Commission Has Repeatedly Found that Information Services are Dependent Upon a Separate, Common Carrier Telecommunications Service.

The Commission has recently expressed its agreement with this construction of the Act as it applies to Internet access service:

> In order to provide those components of Internet access services that involve information transport, ISPs lease lines, and otherwise acquire telecommunications, from telecommunications providers – LECs, CLECs, IXCs, and others. . . . Thus, the information service is provisioned by the ISP "via telecommunications" including interexchange communications although the Internet service itself is an "information service" under section 3(20) of the Act, rather than a telecommunications service.[37]

---

[36] 47 U.S.C. § 153(43)(emphasis added).

[37] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Order on Remand, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91; FCC 99-413, ¶ 34 (rel. December 23, 1999) (*Advanced Services Remand Order*) (emphasis added).

The Commission reiterated this understanding in its *amicus* brief to the court in *Portland*:

> Thus, the FCC has long distinguished between basic telecommunications" or "transmission" services, on the one hand, and "enhanced services" or "information services" that are provided by means of telecommunications facilities, on the other hand. Congress in 1996 codified the FCC's long-standing distinction by adding new definitions to the Communications Act. The Act now defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 145(43). The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).
>
> As these definitions make clear, an information service is distinct from, but uses, telecommunications.[38]

Further, the Commission's view of the relationship between basic transport and information services, with which EarthLink strongly agrees, dates back at least twenty years. In *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, ("*Computer II*"), the Commission said:

> [A]n essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which advanced services are offered. Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions.[39]

---

[38] Commission *Amicus Brief* to *Portland* at 3-4 (emphasis added).

[39] 77 F.C.C. 2d. 384 at ¶ 231 (1980)(*Computer II*)(emphasis added). The Commission has held that the *Computer II* terms "enhanced services" and "basic services," respectively, are the functional equivalents of the current statutory terms "information

In the *Universal Service Report,* the Commission stated that "we conclude that Congress intended the 1996 Act to maintain the *Computer II* framework."[40]

Reading these Commission pronouncements together, two basic points are clear. First, the Commission has correctly decided that Internet access is an "information service."[41] Second, the Commission has recognized that Internet access is provided "via telecommunications," and that the "telecommunications" transport service is a common carrier service that is a necessary input that is separate and distinct from the overall information service commonly known as Internet access.[42]

EarthLink agrees with the Commission's long-standing approach of treating "information services" ("enhanced services" in pre-1996 Act terminology) as subject only to the Commission's ancillary jurisdiction under Title I of the Act. Where EarthLink disagrees with the Commission's position to date is in the proper treatment of the "telecommunications," or pure transport, service over which cable-based Internet access is provided. It is this transport service ("cable modem service" in the terminology of the NOI) that Title II of the Act requires cable companies to provide to ISPs on a non-discriminatory basis. It is with respect to this point regarding the proper regulatory treatment of cable

---

(footnote continued)
services" and "telecommunications services." *See Universal Service Report,* 13 FCC Rcd 11501, ¶ 21 (1998).

[40] *Universal Service Report* at ¶ 45.

[41] *Advanced Services Remand Order* at ¶ 34.

[42] FCC *Amicus Brief* to *Portland* at 3-4; *Computer II* at ¶ 231; *Universal Service Report* at ¶ 21.

modem services that the Communications Act's definitions of "telecommunications," "telecommunications service," and "telecommunications carrier" come into play.

3. The Statutory Definitions Leave No Doubt That Cable Modem Service Is A Common Carrier Telecommunications Service.

a. Information Services are Provided Via Telecommunications.

Section 3(43) of the Act (47 U.S.C. § 153(43)) defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received." As discussed above, the Commission has already held that transmission or transport for the purposes of providing information services (including Internet access) constitutes "telecommunications."[43] The court in *Portland* agreed with this position:

> Under the statute, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscribers access to the Internet at a "point of presence" assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic "telecommunications," which the Communications Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).
>
> * * *
>
> Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband

[43] *Advanced Services Remand Order* at ¶ 34; Commission *Amicus Brief* in *Portland* at 3-4.

facility, it is providing a telecommunications service as defined in the Communications Act.[44]

There can be no doubt that the *Portland* court is correct in its conclusion that transport for the purposes of Internet access constitutes "telecommunications" under the Act. Internet use by its very nature involves user-controlled information transmission that is transported from one end of the network to the other without change. Moreover, section 3(20) of the Act (47 U.S.C. § 153(20)) defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . ." (emphasis added.) Inasmuch as the Commission has already properly acknowledged that Internet access is an information service,[45] the transport mechanism by which that information service is delivered is "telecommunications" under the plain words of the statute.

b. Cable Modem Service is a Telecommunications Service Under the Two-Prong Test Set Forth in the Act.

Having found that cable-based transport for the purposes of Internet access is "telecommunications," the *Portland* court also correctly determined that cable transport for Internet access is a "telecommunications service." Although the step from "telecommunications" to "telecommunications service" is a short one, the terms are nonetheless defined separately in the Act, and they cannot be assumed to mean precisely the same thing. The *Portland* court's conclusion that cable transport used to provide Internet access is a

[44] *Portland*, 216 F.3d at 877, 878 (emphasis added).

[45] *Advanced Services Remand Order* at ¶ 34.

telecommunications service is undoubtedly correct. In light of the NOI's specific question regarding the difference between "telecommunications" and "telecommunications service" (*see* NOI at ¶ 19), however, we address the issue in some detail. Section 3(46) of the Act (47 U.S.C. § 153(46)) states:

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Turning to the statutory language that differentiates "telecommunications service" from "telecommunications," there are two tests that must be met in order for a particular offering of "telecommunications" to be "telecommunications service." First, the telecommunications must be offered "for a fee." Second, the telecommunications must be offered "directly to the public, or to such classes of users as to be effectively available directly to the public."[46]

(i) Cable Modem Service is Provided For a Fee.

The cable modem services at issue rather obviously meet both prongs of the test. There can be no doubt that the services are offered "for a fee." Although there are some "free" dial-up ISP services, they are "free" only in the sense that the ISP does not charge the user for access. However, both the subscriber and the ISP each pay the local exchange carrier or other telecommunications provider for the telecommunications link needed to access the "free" service. In any case, EarthLink knows of no instance in which cable-based Internet access is being provided to users without charge. In this regard, we attach as examples of the fee structures in the industry pricing information

[46] 47 U.S.C. § 153(46).

printed from the web sites of Excite @Home and Road Runner, the two leading cable-based ISPs. *See* Exhibit 1 hereto.

Although the charge for the cable modem service is subsumed in the overall Internet access fee, it is clear that some component of that fee in fact goes to cover the cost of providing the transport service. In the *Universal Service Fourth Order on Reconsideration,* the Commission rejected the argument that the offering of an information service and a telecommunications service to consumers for a single price somehow "taints" the telecommunications service and thereby renders the whole package an information service. The issue, the Commission stated, is

> whether, functionally, the consumer is receiving two separate and distinct services. A contrary interpretation would create incentives for carriers to offer telecommunications and non-telecommunications for a single price solely for the purpose of avoiding universal service contributions. [47]

The Commission's analysis in the *Universal Service Fourth Order on Reconsideration* was in the context of universal service contributions, but the same analysis applies in this context. In the case of Internet access offered over cable modem services, the consumer clearly is receiving two distinct services, especially in light of the fact that the cable industry has conceded that there are no technical barriers to its ability to provision data transmission services to consumers or independent ISPs over cable facilities. The fact that the cable operator and its ISP affiliate choose to offer both services to the consumer for a

---

[47] *In the Matter of Federal-State Joint Board on Universal Service,* Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-420, ¶ 282 (rel. December 30, 1997)*(Universal Service Fourth Order on Reconsideration*).

single price has no bearing on whether or not they are separate services for regulatory purposes under the Act.

(ii) To the Public.

The second prong of the test of whether or not a service meets the statutory definition of a telecommunications service under the Act is that it must be offered "directly to the public, or to such classes of users as to be effectively available directly to the public." Here again there can be little doubt that the test is met. Exhibit 1, referenced above, demonstrates that Internet access offered via cable modem services is being offered indiscriminately and on standard terms and conditions to all members of the public who have access to upgraded cable transport facilities.

In the event that cable operators argue that they are not providing cable modem services directly to the public, but are instead offering that transport only to selected ISPs, the Act's language regarding offering of service "to such classes of users as to be effectively available directly to the public" is sufficient to answer such an argument. It is clear that when Excite@Home or RoadRunner offer Internet access service they are making their service available to the public. Thus, the underlying telecommunications used to transport that Internet access service is also -- as a matter of logic, network engineering necessity, and statutory definition -- being made available to the public.

If the Commission were to accept the argument that an information service provided through an affiliate of the transport facility owner can be made available to the public without having the transmission service used to carry that information service to the public being considered a telecommunications service, it would provide a blanket waiver for all facilities-based

telecommunications carriers to escape Title II regulation under the Act. Essentially, if it were to accept such an argument, the Commission would be sanctioning a shell game in which the transmission facility owner, by refusing to provide transmission services to any information service provider other than its own affiliate, would be able to provide information services indiscriminately to the public for a fee without becoming a common carrier subject to Title II of the Act. As discussed further below, the Commission and the courts have refused to accept such an argument in the past.

EarthLink anticipates that cable companies that provide Internet access (either directly or through their ISP affiliates) may also make the related argument that they are not offering a separate telecommunications service to the public. In other words, they may argue that the transport (telecommunications) service over which the Internet access information service rides is never offered by itself, but is offered only as a means of providing the information service. The argument continues that the single service being offered is an "information service" that is not regulated under Title II of the Act. If made, this is simply the "bundling" or "contamination theory"[48] argument that the Commission has consistently rejected with respect to facilities-based carriers, much the same as the Commission refused to allow the fact that a carrier or an ISP chose to offer a telecommunications service and an information service for a single price to the consumer to "taint" the

[48] The combination of a basic transport service with an enhanced service offering by a non-facilities based carrier "contaminates" the basic offering, with the result that the entire offering is treated as an "enhanced" service. *Independent Data Communications Manufacturers Association Inc.*, Memorandum and Order, 10 FCC Rcd 13717, 13720, ¶ 18, (rel. October, 18, 1995)(*Frame Relay Final Order*).

telecommunications component and render the entire package an information service.[49]

The Commission specifically rejected the application of the "contamination" theory to AT&T's provision of frame relay services in conjunction with enhanced services, stating:

> To date, the Commission has not applied the contamination theory to the services of AT&T or any other facilities-based carrier. Indeed, the Commission rejected that alternative in *Computer III* and other proceedings.
>
> * * *
>
> Moreover, application of the contamination theory to a facilities-based carrier such as AT&T would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework. . . . This is obviously an undesirable and unintended result.[50]

More recently, the Commission rejected a variation of the contamination theory when it found that:

> [C]arriers which offer basic interstate telecommunications functionality to end users (such as ISP subscribers) are "telecommunications carriers" covered by the relevant provisions of section 251 and 254 of the Act "regardless of the underlying technology those service providers employ, *and regardless of the applications that ride on top of their services.*" In other words, even though the access provided to the ISP by the local exchange carrier facilitates the delivery of an information service because of the "applications that ride on top" of the telecommunications service, that same access necessarily facilitates the origination of the underlying telephone toll service used to transport the ISP's Internet access service.[51]

---

[49] *See Universal Service Fourth Order on Reconsideration* at ¶ 282, discussed *supra.*

[50] *Frame Relay Final Order* at ¶¶ 42 and 44 (ellipses and emphasis added).

[51] *Advanced Services Remand Order* at ¶ 37 (italics in original)(emphasis added).

As these decisions make clear, the Commission has consistently found that facilities-based providers of information services cannot escape their common carrier obligation by claiming that they are providing an information service, but not a telecommunications service, to the public for a fee.

c. The Commission and Congress Have Always Required that the Underlying Transport Service Be Provided on A Common Carrier Basis.

In *Computer II* the Commission made it clear that basic transmission service used to provide enhanced services must be provided as a separate common carrier service when such basic transmission service is provided by a facilities-based carrier:

> Based on the voluminous record compiled in this proceeding, we adopt a regulatory scheme that distinguishes between the common carrier offering of basic transmission services and the offering of enhanced services. . . . We find that basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information. . . ."[52]

The Commission went on to adopt a "resale" structure under which it required all facilities-based providers of enhanced services -- non-dominant as well as dominant -- to make separately available to other enhanced service providers the basic transmission services over which enhanced services travel:[53]

> By removing other carriers from the separate subsidiary requirements of the First Computer Inquiry, they are now able to offer

---

[52] 77 F.C.C. 2d. 384, 386, ¶ 5 (rel. April 7, 1980)(emphasis added)(*Computer II*)

[53] The Commission has recently affirmed its understanding that Congress adopted the basic service/enhanced service dichotomy of *Computer II* when it passed the Telecommunications Act of 1996. Under that law, "enhanced services" became "information services," and "basic services" became "telecommunications services." *See Universal Service Report,* 13 FCC Rcd 11501 at ¶ 21.

> basic and enhanced services through common computer and transmission facilities. However, an essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered. Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariff when their own facilities are utilized. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions.[54]

In its *Frame Relay Final Order* the Commission reiterated its requirement that all facilities-based common carriers must provide basic transmission on a non-discriminatory basis for the purposes of allowing other enhanced services providers to transmit their services:

> Thus, having applied Commission Rules and found that frame relay service is a basic service, we conclude that, pursuant to the *Computer II* decision, all facilities-based common carriers providing enhanced services in conjunction with frame relay service must file tariffs for the underlying frame relay service and acquire that tariffed service in the same manner as resale carriers. This requirement applies independently of any additional requirements (such as CEI) under the *Computer III* requirements.[55]

In the *Advanced Services Order and NPRM*, the Commission reaffirmed its *Computer II* and *Frame Relay Order* determinations that "enhanced services" must be offered over distinct "basic" services that are offered as common carrier transmission vehicles.[56] In so doing, the Commission updated its terminology to reflect the new definitions in the 1996 Act:

---

[54] *Computer II* at 474 (emphasis added).

[55] *10 FCC Rcd 13717* at 13725, ¶ 59 (emphasis added).

[56] *Advanced Services Memorandum Opinion and Order And Notice of Proposed Rulemaking, 13 FCC Rcd. 24012, FCC 98-188* (rel. August 7, 1998)(*Advanced Services Order and NPRM*).

> We conclude that advanced services are telecommunications services. The Commission has repeatedly held that specific packet-switched services are "basic services, that is to say, pure transmission services. xDSL and packet switching are simply transmission technologies. To the extent that an advanced service does no more than transport information of the user's choosing between or among user-specified points, without change in the form or content of the information as sent and received, it is "telecommunications," as defined by the Act. Moreover, to the extent that such a service is offered for a fee directly to be public, it is a "telecommunications service."[57]

More recently, in a ruling regarding inter-carrier compensation for ISP-bound traffic, the Commission had this to say:

> The Commission previously has distinguished between the "telecommunications services component" and the "information services component" of end-to-end Internet access for the purposes of determining which entities are required to contribute to universal service. Although the Commission concluded that ISPs do not appear to offer "telecommunications service" and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund, it has never found that "telecommunications" end where "enhanced" service begins. To the contrary, in the context of open network architecture (ONA) elements, for example, the Commission stated that "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II."[58]

In making that statement, the Commission cited to *Filing and Review of Open Network Architecture Plans*. In that proceeding, the Commission said:

> We do not accept Bell Atlantic's argument that basic services used with interstate enhanced services are not subject to interstate tariffing under Title II of the Act. Bell Atlantic seems to reason that because enhanced services are not common carrier services under Title II, the basic services that underlie enhanced services are somehow also not subject to Title II. We do not agree. Enhanced services by definition are services "offered over common carrier transmission facilities." Since the *Computer II* regime, we have consistently held that the addition of the

---

[57] *Advanced Services Order and NPRM* at ¶ 35 (emphasis added).

[58] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling In CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68,* FCC 99-38, ¶ 13 (rel. February 26, 1999)(ellipsis and brackets in original)(emphasis added)(*Declaratory Ruling and NPRM*).

> specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service. *Computer III* does not change this principle. Indeed, we have explicitly held that the "basic services involved in such [CEI/ONA] offerings are to be tariffed in the appropriate federal or state jurisdiction." [59]

As the foregoing examples indicate, the Commission has for over twenty years, both before and after the passage of the 1996 Act, consistently maintained a distinction between "enhanced services" (now "information services" in the terminology of the amended Act) and "basic" transport services ("telecommunications services" under the amended Act). Without exception, what are now known as information services have always been recognized as being provided over common carrier services regulated under Title II of the Act. As noted above, the 1996 amendments to the Act explicitly adopt the distinction between the two types of service by specifying in the definition of "information service" that such service is provided "via telecommunications." Moreover, the definitions of "information service" and "telecommunications" describe two very different functionalities. On the one hand, "information services" provide the capability of "storing, transforming, processing," and otherwise manipulating information. On the other hand, "telecommunications" by definition involves the transmission of information without such manipulation.

The language of the 1996 Act, the Commission's recent interpretations of that language, and over twenty years of Commission precedent all indicate that the Communications Act, as amended, recognizes that information services like

[59] 4 FCC Rcd 1, 141, ¶ 274 (1988)(brackets in original) (emphasis added).

Internet access are always provided over a facilities-based common carrier telecommunications service that is subject to Title II of the Act.

d. **Specific Provisions Added By The 1996 Act Support The Conclusion That A Common Carrier Transport Service Is Required**.

There is nothing in the language of the Act to indicate that Congress in 1996 intended to change the long-standing regulatory distinction between "basic" and "enhanced" service. Indeed, Congress indicated just the opposite in several different amendments it made in the 1996 Act. For example, section 251 of the Act provides:

> (i) SAVINGS PROVISION. – Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.[60]

Section 201, of course, begins with the requirement that: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; . . . ." Even more specific and relevant is the provision at section 251(g), in which the Congress explicitly preserved the Commission's prior rulings with respect to common carrier obligations:

> On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such regulations are explicitly

[60] 47 U.S.C. § 251(i).

> superseded by regulations prescribed by the Commission after such date of enactment.[61]

The definition of "telecommunications carrier" in the amended Act further supports the conclusion that Congress in 1996 intended to maintain unchanged the fundamental concept of telecommunications common carriage, while at the same time continuing to recognize that common carrier status depends upon the nature of the services provided. That definition provides in relevant part that:

> A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services. . . ."[62]

In summary, recognition of cable modem service as a telecommunications service is supported by the only reading of the Act that is consistent with its plain language, Commission precedent, and years of common carrier regulatory policy of which the Congress was aware and chose not to change in 1996.

C. Cable Modem Service Is Not A "Hybrid" Service Subject To Some Regulatory Regime Other Than Title II Of The Act.

At paragraph 15 of the NOI, the Commission requests comment on the possibility that cable modem service could be considered a "hybrid service subject to multiple provisions of the Act." The NOI raises a similar point at paragraph 24, in which the Commission asks "whether cable modem service and/or the cable modem platform is distinct from the regulatory classifications

---

[61] 47 U.S.C. § 251(g).

[62] 47 U.S.C. § 153(44)(emphasis added).

identified above and would require a new legal and policy framework." Both questions must be answered in the negative.

1. There Is No Separate Regulatory Treatment For "Hybrid Services."

The Commission addressed the issue of "hybrid services" in its *Universal Service Report.* In so doing, the Commission stated the following as its understanding of that term:

> We note that the phrase "mixed or hybrid services," as used in the Appropriations Act, does not appear in the text of the 1996 Act. We understand this term to refer to services in which a provider offers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available via telecommunications, *and* as an inseparable part of that service transmits information supplied or requested by the user."[63]

The Commission then went on to state that, for purposes of determining whether providers of such services were required to contribute to the universal service fund, "hybrid services would be considered to be information services." In so doing, the Commission cited to its *Computer* decisions, and reiterated its conclusion that Congress in 1996 intended to adopt the *Computer II* regulatory regime:

> The Commission has considered the question of hybrid services since *Computer I*, when it first sought to distinguish "communications" from "data processing." *Computer II* provided a framework for classifying such services, under which the offering of enhanced functionality led to a service being treated as "enhanced" rather than "basic." An offering that constitutes a single offering from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components. As we have explained above, we find that Congress intended to leave this general approach intact when it adopted the 1996 Act."[64]

---

[63] *Universal Service Report,* 13 FCC Rcd 11501, ¶ 56 (emphasis in original).

[64] *Id.* at ¶ 58 (footnotes omitted in original).

Applying the *Computer II* framework, the Commission emphasized the distinction under that framework between information services offered by facilities-based providers and such services offered by non-facilities-based providers:

> We recognize that the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or on the other hand, is providing two distinct services, one of which is a telecommunications service. It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail. Since *Computer II*, we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced. But the matter is more complicated when it comes to offerings by facilities-based providers. We noted recently in the *Universal Service Fourth Order On Reconsideration*, considering a related question, that "[t]he issue is whether, functionally, the consumer is receiving two separate and distinct services."[65]

In connection with the final sentence of the language quoted above, the Commission cites to paragraph 282 of the *Universal Service Fourth Order On Reconsideration*. The discussion in paragraph 282 deals with value-added networks ("VANs"), which are non-facilities-based providers. In that discussion, the Commission carved out from the "contamination theory" telecommunications services offered by VANs under certain circumstances. In other words, to the extent that it reflects any modification of *Computer II*, the cited decision indicates a movement towards including more services (specifically, interstate voice-grade telecommunications lines) in the "telecommunications" classification when such services are offered by non-facilities-based carriers that primarily provide information services.

---

[65] *Universal Service Report, 13 FCC Rcd 11501* at 60 (footnotes omitted in original) (emphasis added).

What the Commission clearly has not done in its previous decisions addressing the issue of "hybrid services" is to retreat in any way from its *Computer II* ruling that facilities-based providers of information services must provide the underlying transmission services used provide those information services to other entities on a non-discriminatory basis. The result of the Commission's discussion of hybrid services in the universal service context, therefore, is that the *Computer II* distinction between information services and telecommunications services was reaffirmed, and the Commission held that the components of hybrid services would fall under one of those two classifications.

Put differently, "hybrid services" are not regulated under some section of the Act other than Title II (common carrier telecommunications services) or Title I (information services), or under some combination of statutory sections. Instead, the underlying transmission services over which "hybrid services" are transported to end users are Title II services, and the information services riding on top of that transmission conduit may only be regulated, to the extent that the Commission decides that they are to be regulated at all, under the Commission's ancillary jurisdiction under Title I. This approach conforms in all respects to the *Computer II* regime.

2. Congress was Aware That Cable Facilities Would be Used to Transport Information Services After Passage of the 1996 Act.

To the extent that some might make the argument that Congress was not aware of cable modem service, and that such service was therefore not addressed in the amendments to the Act made by the 1996 Act, the legislative history of the Act does not support that position. To the contrary, Congress

was well aware prior to the passage of the 1996 Act of the cable industry's intentions to provide two-way data transport. On May 10, 1995, Mr. Gerald Levin, Chairman and CEO of Time Warner Incorporated, testified before the Telecommunications and Finance Subcommittee of the House Commerce Committee regarding his vision of where the cable industry fit into the future of the national information infrastructure, also known as the "information superhighway." The following representative excerpts from Mr. Levin's written testimony illustrate that Congress was well aware of the role that cable would play under the new statute:

> One fact remains. A new world of digital interactivity has already come into existence. There are today 25 million people on the Internet. Today every major communications company in the world is actively developing plans to employ the immense potential of interactivity, and today our company is running the first full service network in Orlando, Florida.
>
> * * *
>
> Time Warner's plans envision much more than just an advanced cable television service, however. On December 14, 1994, Time Warner turned on its Full Service Network in Orlando, Florida, allowing consumers to experience first-hand the world's first broadband digital interactive network. The Full Service Network is technically capable of offering an open-ended selection of services, including interactive educational instruction, games, and shopping; alternative access to long distance telephone service; high speed data transfer between local area networks; personal communications service; video on demand; and video conferencing.
>
> * * *
>
> Because our network is based on fiber and coaxial cable, residential and business customers will receive extremely reliable telephone service with excellent clarity that is comparable to or better than that provided by existing telephone companies. Included in the advanced services that we will offer are call forwarding, call waiting, caller ID, conference calling, automatic dialing and multi-featured voice messaging. Time Warner will also provide Integrated Services Digital Network (ISDN), which allows simultaneous transmission of voice and data over a single line and eliminates the need to create separate networks in a customer's home or business.

* * *

> Time Warner has also been active in development of "alternative access" telephone operations in connection with our metropolitan area cable systems. These operations generally provide connections between large businesses and their long distance telephone providers, between multiple business locations of a large company, and between long distance telephone company locations. These connections are used primarily for high volume voice and data communications, and do not require Time Warner to install switching equipment.
>
> * * *
>
> Time Warner strongly urges prompt enactment of telecommunications reform legislation. Congress has a unique opportunity to reclaim telecommunications policy from the courts and codify a framework that will allow competition to flourish.
>
> Our experience in transforming cable systems into digital, broadband switched networks provides vivid proof that the technology is here today to provide consumers with a true choice in local telephone service along with vastly improved video and information services over a fully interactive broadband network."[66]

Decker Anstrom, President of the National Cable Television Association, put it even more forcefully in testimony to the Senate Committee on Commerce, Science, and Transportation:

> Our systems today pass over 95 percent of homes in the U.S., and carry up to 900 times more information than telephone facilities. Already several leading cable companies are building state-of-the-art communications facilities that deliver voice, video and data over the same wire.
>
> Put simply, if this committee wants to bring competition to the local phone monopoly, we are it. We are the other wire. Cable has the infrastructure, the technology, the expertise, and the desire to compete with the local phone industry. What we do not have is sufficient capital or, in most States, the legal authority to compete with the local loop."[67]

---

[66] *Communications Law Reform: Hearings Before the Subcommittee On Telecommunications and Finance of the House Comm. on Commerce,* 104th Cong. 75-84 (May 10, 1995)(testimony of Mr. Gerald Levin, Chairman and CEO of Time Warner, Inc.)(hereinafter *1995 House Hearings*)(emphasis added).

[67] *Telecommunications Policy Reform: Hearings before the Senate Committee on Commerce, Science, and Transportation,* 104th Cong. 2 (1995), S.Hrg.104-216, (hereinafter *1995 Senate Hearings*)(testimony of Mr. Decker Anstrom, President of the National Cable Television Association))(emphasis added).

That Congress understood that two-way data and information services were among the services that would be covered by the regulatory regime that it was creating is further reinforced by the testimony of Mr. Thomas V. Schockley, III, Executive Vice President of Central and South West Corporation. In discussing the role that electric utilities could play in building "last mile" broadband facilities, Mr. Schockley testified that:

> The extension of broad band communications over the "last mile" from existing long distance fiber optic lines to homes, businesses, hospitals, libraries, schools and local governments would revolutionize the way that Americans use information. The best description of this potential transformation is clearly the "information superhighway" – a metaphor with which we are all familiar."[68]

Cable industry representatives testified numerous times before Congress at hearings prior to the passage of the 1996 Act. Without fail, each of those representatives raised four specific points with respect to Congressional action to reform the Act. The four points consistently, and almost exclusively, made by cable representatives testifying before both the House and the Senate on legislation that became the 1996 Act were that any legislation must include:

---

[68] *1995 House Hearings* at 101-102 (emphasis added). There are myriad other references to the "information superhighway," the phrase then in common use to describe what is more commonly referred to today as the Internet. *See, e.g.*, H.R. Rep. No. 103-560, at 36 (1994). There, in a discussion of universal service, the Committee noted:

> Any new plan to reform the funding system for universal service will have to take into consideration the effect of the proliferation of digital technologies and the creation of the so-called "information superhighway" on the definition of universal service. Digital technologies allow information to be sent in the language of computers via various conduits (some more efficient than others), while the information superhighway refers to the creation of a seamless network of networks that will develop from the impending and unavoidable convergence of telecommunications, broadcast, cable, information services, and other telecommunications technology.

> One, the elimination of state and local barriers to telecommunications competition; two, the creation of a well developed set of requirements for interconnection, access, and unbundling; three, the prevention of interference by local authority in the growth of competing services; and, four, the recognition that to enhance telephone competition, debilitating cable rate regulation must be reformed."[69]

In all of the oral and written testimony presented to Congress, however, conspicuously absent is any indication that the cable companies believed that the services that they offered would be regulated under anything except Title VI or Title II of the Act.

By adding section 253 of the Act preempting State and local barriers to the provision of telecommunications services, including local exchange service, Congress addressed the first concern of the cable industry highlighted by Mr. Levin in his testimony.[70] In adding sections 251 and 252 to the Act Congress addressed the second concern of the cable industry regarding the need for specific interconnection, access, and unbundling requirements so cable operators could use their facilities to compete with the incumbent local phone companies.[71] By amending section 621(b) of the Act to prohibit local franchising authorities from requiring or regulating the provision of telecommunications service pursuant to their title VI authority Congress addressed the third concern expressed by the cable industry.[72] And finally, Congress addressed the capital concerns expressed by the cable industry by

---

[69] *1995 House Hearings* at 75 (testimony of Mr. Gerald M. Levin). *See also 1995 House Hearings* at 34-35 (testimony of Mr. Brian Roberts, President of Comcast Corp. and incoming Chairman of the National Cable Television Association), and *1995 Senate Hearings* at 2-3 (testimony of Mr. Decker Anstrom).

[70] 47 U.S.C. § 253.

[71] 47 U.S.C. §§ 251-252.

[72] 47 U.S.C. § 541(b).

amending section 623 of the Act to remove rate regulation on all but the basic tier of cable services, and to deregulate even basic tier services whenever an unaffiliated local exchange carrier offers video programming directly to subscribers in the franchise area of the cable operator.[73] From these actions it is clear that Congress wished to ensure that the cable industry was in fact able to be the "facilities-based competitor" that the conferees specifically discussed in the Statement of Managers in the conference report accompanying S. 652, the Telecommunications Act of 1996.[74]

Against this clear evidence that Congress was aware of the existence and potential of the Internet and, more specifically, the role that cable would play in the development of that network, there is no basis to conclude that Congress created a regulatory structure that ignored either the Internet or the cable industry's involvement in its growth. Accordingly, it would be neither logical nor legally supportable for the Commission to entertain proposals based on the proposition either that the Act does not address cable modem service or that the Act contemplates some sort of mixing of the well-defined Title II and Title VI regimes.

In this regard it bears repeating that the statute is expressly designed to be technologically neutral.[75] As discussed above, the language of the statute, twenty years of consistent Commission precedent, and the Act's legislative

---

[73] 47 U.S.C. § 543.

[74] *See 1996 Conference Report* at 148. *See also* H.R. Rep. No. 104-204, pt. 1, at 77 (1995)(The bill managers note the fact that cable services are "available to 95 percent of United States homes"), and *1995 House Hearings* at 76, 125.

[75] *See* 47 U.S.C. § 153(44)("telecommunications service" defined functionally, "regardless of the facilities used"); *see also Universal Service Report* at ¶ 59 ("A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure.")

history all demonstrate that facilities-based transmission services used to provide information services (Internet access being one example) are "telecommunications services" subject to Title II of the Act. The Commission has had no difficulty or hesitation in reaffirming its *Computer II* ruling that facilities-based providers of both packet-switched services such as frame relay and xDSL and traditional circuit-switched dial-up telecommunications used for Internet access must continue to offer those services on a non-discriminatory common carrier basis.

Despite this long-standing, clear, and recently reaffirmed (by the Commission and the Congress) functional analysis, cable interests continue to argue that their facilities-based transmission services used to provide Internet access should be treated differently than the functionally identical services offered by carriers that began their existence as telephone companies. The only differences between the facilities-based transmission services offered by telephone companies and the facilities-based transmission services offered by cable companies are (1) the nature of the facilities used and (2) the identities and corporate histories of the companies offering the services. Both of these differences are entirely irrelevant to the regulatory classifications in the Act, which classifications are based solely upon the nature of the service, not who provides it or how. In the end, therefore, the cable industry argument amounts to nothing more than "treat cable differently because it is cable." Such an argument is completely at odds with every applicable legal authority and must be rejected.

3. The Commission Has Repeatedly Stated that the Amendments Made by the 1996 Act Are Technologically Neutral; Cable Facilities Used to Provide Telecommunications Services Are Subject To The Same Rules As Telecommunications Facilities Used To Provide the Same Services.

The Commission has found on numerous occasions that Congress intended the 1996 Act to be technologically neutral and to ensure competition in all telecommunications markets.[76] Further, the Commission recently noted to the court in *Portland* that "it is not readily apparent why the classification of the service should vary with the facilities provided."[77] The Commission is right on both counts.

Because "information services" are provided to the public by means of a telecommunications service, a cable operator is operating as a competitive local exchange carrier (CLEC) to the extent that it is providing to end users – either ISPs or consumers – the basic transport service used to transmit those services. AT&T, for example, has already admitted that it would be a CLEC when it provides "telecommunications service" over its cable facilities, albeit with the caveat that it is not yet one because it may provide Internet access and other information services over its cable system as a "cable service," rather than "via telecommunications" as all other local exchange carriers do.[78] For all of the reasons set forth above, it is clear that Internet access and other information services are not "cable services," and that a cable operator must be a CLEC

---

[76] *See Advanced Services Order and NPRM* at ¶ 11, and *Advanced Services Remand Order* at ¶¶ 1 and 2.

[77] *Commission Amicus Brief* in *Portland* at 25.

[78] *Joint Reply of AT&T and TCI,* pp. 53-54.

when it is providing Internet access and other information services to the public using cable modem services.[79]

The Internet access provided by cable operators through Excite@Home and Road Runner is no different from the Internet access provided by any other local exchange carrier (incumbent or competitive) through its own affiliated ISP. The Commission itself describes cable modem service, and in particular the service provided to AT&T's customers through @Home, in terms of separate services that are bundled together when offered to the consumer. One of the services is "the underlying transport service" or "use of the cable network for data delivery services," while the others are described as "Internet access" and "content."[80] When discussing Internet access provided by incumbent local exchange carriers using broadband transmission technology the Commission stated recently that:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: The first service is a telecommunications service (e.g., the xDSL-enabled transmission path),

---

[79] The structure of the Act as amended by the 1996 Act fully supports this result. All of the amendments to the Act that were made by the 1996 Act which include the term "information service" were placed in Title II. *See* 47 U.S.C. §§ 228, 230, 251, 254, 256, 258, 259, 271, 272, and 274. None of the amendments made by Congress to Title VI in the 1996 Act used the term "information services." Instead, the major thrust of the changes Congress made to Title VI of the Communications Act in the 1996 Act were devoted to maintaining the demarcation line between "cable services" and non-cable (i.e. telecommunications and information) services. *See* 47 U.S.C. § 571 – 573. Finally, in Title V of the 1996 Act, Congress made numerous changes to existing law to address concerns about obscenity and violence on the Internet and on television. All of the provisions addressing the Internet or computer services were included in Title II of the Communications Act, while no mention of either computers or the Internet was included in the provisions dealing with video programming and cable services.

[80] *In the Matter of Applications for Consent to the Transfer of Control of Licenses from TCI to AT&T*, CS Docket No. 98-178, Memorandum and Order, FCC 99-24, ¶ 70 (rel. Feb. 18, 1999)(*AT&T/TCI Order*); *FCC Amicus Brief* in *Portland* at 12-13.

and the second service is an information service, in this case Internet access.[81]

In addition, the Commission has repeatedly found that "advanced services" like packet-switching and xDSL service are "telecommunications" and that when "advanced services" are provided by an incumbent local exchange carrier they are either "telephone exchange service" or "exchange access."[82] Any person who provides "telephone exchange service" or "exchange access" is a "local exchange carrier" for purposes of the Communications Act. 47 U.S.C. 153(26).

Other than the nature of the facilities used, there is no significant difference between the broadband Internet access offered by cable operators like AT&T and Time Warner over their cable facilities and that offered using xDSL services by local exchange carriers. As a matter of law there is no support in the Act for different regulatory treatment of these identical services based solely on the type of facilities used, nor does the Act draw any distinction between types of local exchange carriers (i.e., incumbent or non-incumbent) or the facilities used for purposes of deciding who is a "local exchange carrier"[83] or a "telecommunications carrier."[84]

---

[81] *Advanced Services Order and NPRM* at ¶ 36.

[82] *Advanced Services Remand Order* at ¶ 3.

[83] "Congress also knew how to distinguish among respective groups of LEC's. . . . When Congress wanted to distinguish traditional, incumbent LEC's from the new "competitive" LEC's (including cable companies) whose entry the Act facilitated, it did so in plain terms." *City of Dallas, Texas v. F.C.C.*, 165 F. 3d 341, 354 (5th Cir. 1999)(ellipsis added).

[84] A "telecommunications carrier" is any person who offers telecommunications to the public for a fee, regardless of the facilities used. *See* 47 U.S.C. § 153(44) and 47 U.S.C. § 153(46).

As one scholar aptly put it, "[t]he Internet is an open architecture; indeed, that is all it is. . . . A connection to the Internet thus is a kind of digital dial tone."[85] The very value of the Internet is that it allows users to communicate over a myriad of networks using a variety of devices. As new section 651 of the Act clearly demonstrates, Congress specifically addressed the regulatory regime for the provision of cable services by a common carrier.[86] In fact, Senate conferees specifically discussed various situations in which a local exchange carrier uses its facilities to provide both cable service and telephone exchange service, and states that each such service will be regulated under the applicable provisions of either Title VI or Title II, but not both.[87]

Likewise, Congress specifically addressed the regulatory regime for the provision of local exchange services, which include telephone exchange service and exchange access, when it added section 251(b) to the Act.[88] As the conferees made clear in the Statement of Managers:

> New section 251(b) imposes several duties on all local exchange carriers, including the "new entrants" into the local exchange market.[89]

Given the repeated testimony to Congress by cable industry executives that they "are it" when it comes to who will compete to provide voice and data

---

[85] HENRY H. PERRITT, JR., *Law and the Information Superhighway*, Aspen Law & Business 13 (1996)(ellipsis added).

[86] *See* 47 U.S.C. § 571.

[87] *1996 Conference Report* at 172 and 178-179 ("Rules and regulations adopted by the Commission pursuant to its jurisdiction under Title II should not be merged with or added to the rules and regulations governing open video systems, will be subject to section 653, not Title II.")

[88] *See* 47 U.S.C. § 251(b).

[89] *1996 Conference Report* at 121 (emphasis added).

services to residential customers if Congress opened the local exchange market to competition, it is apparent that the statement by Congress that the obligations imposed by section 251(b) apply to "new entrants" encompasses the cable operators who are providing telephone exchange service or exchange access. As the Commission has repeatedly found, the basic transport service used to provide Internet access to consumers and ISPs is telephone exchange service or exchange access.[90] To maintain that Congress addressed the provision of cable services by local exchange carriers, but not the provision of local exchange service by cable operators, is simply not supported by the plain language of the statute or its legislative history. As a result, the Commission should apply the statutory regime constructed by Congress to all providers of telecommunications services as the statute commands, i.e. "regardless of the facilities used."

II. THE LANGUAGE OF THE ACT, COMMISSION PRECEDENT, AND SOUND PUBLIC POLICY ALL REQUIRE THAT THE COMMISSION STATE UNEQUIVOCALLY THAT FACILITIES-BASED PROVIDERS OF CABLE MODEM SERVICES MUST MAKE THEIR TRANSMISSION SERVICES AVAILABLE ON A NON-DISCRIMINATORY BASIS TO ALL ISPS.

Beginning in Subpart B of the NOI (¶ 25 *et seq.*), the Commission asks a series of questions, including, "What is Open Access?," "Is Open Access a Desirable Policy Goal?," and "What Are the Most Appropriate Means of Reaching that Goal?" Earthlink addresses these related questions below.

[90] *Advanced Services Remand Order* at ¶ 3.

A. Congress Has Already Required "Open Access."

Based on the analysis in the preceding sections, EarthLink agrees with the *Portland* court that cable modem services are "telecommunications services." As such, cable modem services are common carrier services subject to Title II of the Act. Title II by its plain terms, and as consistently interpreted by the Commission for over twenty years, requires facilities-based providers of telecommunications services to offer those services on nondiscriminatory terms and conditions to all users.[91] Because of this clear statutory requirement, it is unnecessary for the Commission to inquire (except as discussed below with respect to forbearance) whether open access is a desirable policy goal. Congress has already addressed that issue and has determined that open access is desirable, and Congress has made it the law.[92]

B. "Open Access" Is The Nondiscriminatory Providing Of Cable-Based Telecommunications Services According To The Requirements Stated In The Act And In Existing Commission Precedent.

Because the Act is clear that cable modem services must be offered on a nondiscriminatory basis, it is not strictly necessary for the Commission to address the issue of what "open access" means. As is the case with the issue of whether open access is a desirable policy, the Act and existing Commission precedent answer the question. Indeed, the Commission's proper and laudable

---

[91] 47 U.S.C. § 201 *et seq.*

[92] *See* 47 U.S.C. § 153(44)("a telecommunications carrier shall be treated as a common carrier"), 47 U.S.C. § 201 ("common carriers must provide service on non-discriminatory terms and conditions"), and 47 U.S.C. § 251(i)("nothing in section 251 shall be construed to limit or affect the Commission' s authority under section 201").

goal of instilling "a measure of regulatory certainty"[93] could be substantially furthered by a simple declaration by the Commission that it acknowledges the Congressional determination that cable modem services are facilities-based common carrier services subject to the requirements of Title II as articulated by the Commission in *Computer II* and related proceedings.

C. Implementation Of Open Access Would Be Aided By Clear Commission Guidance.

Although the Act and existing precedent provide substantial guidance as to how open access should be implemented, further uncertainty would be avoided if the Commission provided somewhat more detailed guidance, although that guidance need not be extensive or intrusive. In this regard, EarthLink respectfully urges that the Commission first simply acknowledge that the requirements enunciated in *Computer II* are applicable to the facilities-based transmission services underlying Internet access and other information services provided over cable facilities. This would mean that ISPs unaffiliated with a cable operator would be able to purchase cable modem services (i.e., the underlying transmission service) on the same terms and conditions as the cable operator would provide those services to an affiliated ISP in an arms-length transaction.

In order for an ISP that is not affiliated with a cable company to protect its rights to nondiscriminatory access to cable modem services, cable companies must be required to make their terms and conditions for service publicly available. At the time that *Computer II* was adopted, and until the very recent past, the public information function has been implemented through

---

[93] NOI at ¶ 2.

tariff filing. Given the Commission's recent order implementing mandatory detariffing for domestic interexchange services, tariffing may no longer be the vehicle of choice.[94] The Commission, however, has provided an alternative means of achieving the same result. At the same time that it ordered that domestic interstate tariffs be cancelled, the Commission imposed a requirement that common carriers post their rates, terms and conditions on their websites, or, for those carriers not having websites, that they otherwise make those rates, terms and conditions publicly available.

The precise means chosen to insure that unaffiliated ISPs have sufficient information to enforce their statutory right to nondiscriminatory access to common carrier cable-based telecommunications services is ultimately not critical. What is essential is that such a mechanism provide enough information to make the ordering and provisioning of such services simple, quick, and non-contentious. To that end, EarthLink urges the Commission to require, at a minimum, that cable operators that use their cable facilities to provide cable modem service for the provision of information services (whether directly or through an affiliated entity), or to provide any other telecommunications service, fulfill their common carrier obligations under Title II by:

1. Allowing ISPs to connect with the cable network in the most technically efficient and feasible manner that does not threaten network operability.

2. Allowing ISPs direct access to and interaction with end users with respect to billing and other customer service functions.

---

[94] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 245(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996)(*Second Report and Order*).

3. Providing network maintenance and administration that insures that all network users receive comparable functionality.

4. Providing sufficient information regarding network structure and operation to allow ISPs to request service in a manner that will minimize delay and technical objections.

5. Allowing ISPs to provide any service that does not threaten network functionality.

6. Not requiring ISPs to provide to the cable operator any information other than technical information essential to the efficient and timely provision of transmission service.

Because the Commission's enunciation of the specific requirements requested above might require a rulemaking, EarthLink urges the Commission to proceed in a two-step manner. The first step, which would not require any further proceedings, would consist simply of a statement by the Commission acknowledging the applicability of *Computer II* and other Title II requirements as set forth in the Commission's existing rules and regulations regarding facilities-based common carriers, including the basic nondiscrimination requirements set forth therein. Issuance of this acknowledgement would provide the basic regulatory guidance necessary to allow cable companies and ISPs to move forward immediately to implement service arrangements that are consistent with existing guidelines for nondiscriminatory treatment.[95] The second step would be a rulemaking to set forth the more specific guidance outlined above.

---

[95] In this regard EarthLink notes that enforcement of common carrier obligations has historically and increasingly been a matter of case-by-case adjudication. We would expect this policy to continue, therefore limiting the need for Commission involvement in the workings of the market. At the same time, we would also expect the Commission to continue its practice of agency enforcement of the law in those cases where it appears that there is a general or systemic noncompliance with the nondiscrimination requirement.

III. THE COMMISSION SHOULD NOT EXERCISE ITS FORBEARANCE AUTHORITY.

The Commission has asked (NOI at ¶ 53 *et seq.*) whether it should exercise its section 10 forbearance authority with respect to cable modem services. Specifically, the NOI asks whether the interconnection requirement of 47 U.S.C. § 251(a) should be waived. Because EarthLink believes that the *Computer II* framework is the appropriate regulatory approach, and because EarthLink agrees with the Commission's conclusion therein that non-facilities-based information services providers are not telecommunications carriers, EarthLink believes that section 201 of the Act, rather than section 251(a), provides the more appropriate source of authority for the open access requirement. Whichever source of authority the Commission chooses to rely upon, however, EarthLink believes that it would be entirely inappropriate for the Commission to use its forbearance authority with respect to the application of the appropriate Title II provisions to cable modem service.

The beginning point for any consideration of the proper use of the forbearance authority is to ask what regulatory requirements are being imposed, and what the advantages and disadvantages of waiving those requirements might be. In the case of cable modem service, the regulatory requirements imposed by Title II are quite minimal indeed. The basic requirements that Title II now imposes on a non-dominant facilities-based common carrier, in this case the cable modem operator, are that, (1) pursuant to *Computer II* and section 201 of the Act, it must unbundle the basic transport service used to provide information services and make that transport service available to other information service providers on the same terms and

conditions that it makes such service available to itself or any affiliate (assuming such terms and conditions are just and reasonable); (2) under section 222 of the Act it must safeguard the customer proprietary network information of consumers and customers to the same extent as any other telecommunications carrier; and (3) under section 251(a) of the Act it must directly or indirectly connect its network to all other telecommunications carriers and may not install features or functions that impair the use of those networks (something such operator must already have done if it provides Internet access to subscribers). In addition, it must comply with section 251(b) of the Act to the extent it is a local exchange carrier, a requirement that to date no competitive local exchange carrier has found so onerous that it has asked the Commission to forbear from its application. Further, to the extent it is a telecommunications carrier, the cable operator would be afforded the protections of section 230 of the Act with respect to its transmission of information services.

Perhaps most important for the purposes of the present debate, it should be stressed that the Commission has not for some time regulated the rates of non-dominant common carriers, and the public information disclosure requirements that have replaced many of the tariff filing requirements are in no way onerous.

In terms of the purposes of the Act, the intent of Congress, and the public interest, the requirement that common carriers act in a nondiscriminatory manner has been at the core of the Act since its inception, and the Commission has repeatedly and correctly held that the nondiscrimination requirement is a fundamental prerequisite for a vibrant,

competitive, market-driven national communications network. Especially in light of the convergence of technologies that accelerates daily, there can be no sound reason to wall off one portion of the network from the minimal but essential section 201 nondiscrimination requirement that is the underpinning of the entire Act.

Setting aside the damage that such an action would do to the continued development of the broadband services market, EarthLink is unable to determine any principle that would allow the Commission to use its forbearance authority with respect cable modem services, but not with respect to the facilities-based transmission of information services by other telecommunications carriers, including dominant and non-dominant local exchange carriers. Given the Act's fundamental premise that regulation of telecommunications services is to be technologically neutral, if the Commission were to allow cable companies to discriminate in the provision of telecommunications services, how could it then deny similar relief to other common carriers?

In addition to the fact that exercising its forbearance authority with respect to cable modem services would start the Commission down a road that has no end other than administrative repeal of the Act, exercise of that authority even solely with respect to cable modem services would not be in the public interest. Everyone agrees that consumer choice and fair competition are the cornerstones both of the Act and of wise communications policy. If cable companies are not required to play by the same rules as other telecommunications common carriers, consumers will have fewer choices, not more, and there will be less competition, not more.

The history of the cable open access debate over the past several years demonstrates that this is the case beyond any doubt. Notwithstanding EarthLink's belief that its recent agreement with Time Warner Cable will, if faithfully implemented in both letter and spirit, be a large step in the right direction for bringing competitive choice to consumers, we must be realistic in acknowledging that that agreement would never have occurred had it not been for the regulatory scrutiny faced by Time Warner as a result of the statutory requirements that the FTC and the Commission approve its merger with AOL. By the same token, EarthLink and others are still seeking workable agreements with other major cable companies. However, cable companies have fought open access with every means available to them. Such a position is legally indefensible. In light of this history, the Commission should not allow a few recent positive developments to lull it into believing that cable-based Internet access will ever be a competitive market unless the minimal and fundamental nondiscrimination requirements of Title II of the Act are applied with full force to cable modem services. In short, recent positive steps are not an indication that the "market" is working. Instead, what is working is that the need for regulatory approval of mergers is creating an opportunity for some ISPs to gain at least minimal access to cable modem services. However, this access is a far cry from the open access presently enjoyed, for the most part, by ISPs seeking transport services from other companies that are common carriers subject to Title II of the Act.

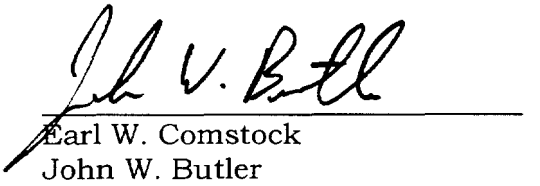
At some point in the future, cable companies may come to agree that opening their systems is in their best interest, as well as in the best interest of their competitors and consumers. That day has not yet arrived, however. If the

Commission were to forbear from applying the basic nondiscrimination requirements articulated in *Computer II* and related proceedings at this stage, EarthLink believes that the recent first steps toward an open market would rapidly be erased, and that the Commission would be faced in a few short years – or sooner – with the same questions that it faces today, but on a much greater scale.

CONCLUSION

For all of the reasons stated above, Earthlink respectfully urges the Commission to state its acknowledgement that cable modem service is a telecommunications service and to adopt rules to facilitate the immediate and nondiscriminatory provision of cable modem services to requesting ISPs.

Respectfully submitted,



Earl W. Comstock
John W. Butler
SHER & BLACKWELL
1850 M Street, N.W., Suite 900
Washington, D.C. 20036
(202) 463-2500

Dave Baker
Vice President
Law and Public Policy
EARTHLINK, INC.
1430 West Peachtree Street
Suite 400
Atlanta, GA 30309

Counsel for Earthlink, Inc.

December 1, 2000

EXHIBIT 1

Speed
Features
Content
Price
Testimonials
FAQ
Sign Up
Can I Get @Home?

The Best Buy on the Net

The @Home service provides you with an unbeatable value on the Internet. For a flat monthly fee, you get unlimited access to all the basics you demand from an Internet service, plus unparalleled reliability, remarkable convenience, rich multimedia content, and blazing speed.

MONTHLY COST COMPARISON

	@Home	vs. Dial-up	vs. DSL
Monthly Service Fee ISP Charges	$39.95 - $44.95*	$14.95 - $21.95	$39.95-$189.96* $10.00-$21.95
Monthly Charges for Additional Phone Line	$0 (not needed)	$15.00 - $20.00	$0 (not needed)
Monthly Toll Charges	$0 (not needed)	Plan Dependent	$0 (not needed)
Total Monthly Charges	$39.95 - $44.95*	$29.95 - $41.95 plus monthly toll charges	$49.95 - $211.90*

* Pricing is for residential service varies by market. Rates may be higher if you are not a cable TV subscriber.

In addition, getting @Home is a breeze. We take care of all the technical stuff for you and, if you experience any difficulty with your service after installation, our technical support team is available 24 hours a day, 7 days a week to answer your toughest questions.

Sign up today for a whole new Internet experience with @Home!

"I had your system installed this morning. I can't begin to tell you how pleased I am with it! YOU ARE FAST! The Installers were just great...quick, efficient and friendly. I found them very, VERY helpful."

Sam Papalia

more

ROAD RUNNER
HIGH SPEED ONLINE

Explore Road Runner
Demo •
See the Blazing Speed •
Features •
Pricing •
Technology •
Requirements •
Availability
Contact Us
FAQ
Advertising on Road Runner
Customer Care
How to Obtain Help •

Pricing

Monthly Service

The price of the Road Runner Online Service varies from market to market. On average, the service runs $39.95 per month. This fee is in addition to the regular monthly cable subscription. The monthly fee includes UNLIMITED, connection-less access to the online service and the Internet (without hourly fees).

Installation

The average price for the one-time installation fee is around $100.00. An installation involves trained staff installing the hardware and software necessary to use the Road Runner Service. An installation also includes a brief training session as well as the presentation of manuals and guides for the new subscriber. Depending on the market, different installation options may be available.

▲ back t